

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
1998 Biennial Regulatory Review –)	CC Docket No. 98-171
Streamlined Contributor Reporting)	
Requirements Associated with)	
Administration of Telecommunications)	
Relay Service, North American Numbering)	
Plan, Local Number Portability, and)	
Universal Service Support Mechanisms)	
)	
Telecommunications Services for Individuals)	CC Docket No. 90-571
with Hearing and Speech Disabilities, and the)	
Americans with Disabilities Act of 1990)	
)	
Administration of the North American)	CC Docket No. 92-237
Numbering Plan and North American)	NSD File No. L-00-72
Numbering Plan Cost Recovery)	
Contribution Factor and Fund Size)	
)	
Number Resource Optimization)	CC Docket No. 99-200
)	
Telephone Number Portability)	CC Docket No. 95-116

**COMMENTS OF THE
NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.**

June 25, 2001

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SUMMARY

The Commission should continue to base universal service contributions on billed interstate and international end-user revenues. The same considerations that let the FCC to adopt the current revenue-based system, such as administrative ease and accuracy of data on which to base contributions, are still valid today.

A flat-fee line-based system would not be as equitable as the current mechanism because it would shift a disproportionate burden of universal service payments to low-volume users. Such a system would also be far more complex to administer than the current system. Prior to 1998, for example, USF assessments were based on pre-subscribed lines. Disputes often arose over line counts, even though only a few carriers were required to contribute. In the current environment, where thousands of carriers are billed, the "whose line is it" problem would be all but impossible to resolve. New technology and provisioning methods, such as xDSL, line sharing and unbundled network elements, would only add to the administrative burdens associated with a per-line system.

Universal service assessments should also continue to be based on billed rather than collected revenues. Relying on "collected" revenues for computing universal service assessment would add unnecessary complexity to the process and reward carriers with poor credit and billing practices at the expense of carriers with low levels of uncollectibles.

The Commission should re-examine the "safe harbor" revenue percentage for CMRS providers. Re-examination is warranted as wireless carriers' percentage of

interstate traffic appears to have increased due to popular “one rate” mobile plans. The current exemption for “de minimis” carriers, however, should be retained. Elimination of the de minimis exemption would require hundreds, perhaps thousands, of additional carriers to contribute to the federal universal service mechanisms, significantly increasing the administrative burdens on small entities and on the administrator.

Finally, the Commission should not limit rate of return carriers' recovery of universal service contributions to end user charges. The Commission should instead permit rate of return carriers to recover universal service contributions via an “explicit” interstate access charge element, with charges assessed on a per-minute of use basis upon all interstate access customers. An explicit per-minute of use charge would be consistent with the intent of section 254(e) of the Act and would avoid imposing unnecessary new line-item charges on rural customers.

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COMMENTS

The National Exchange Carrier Association, Inc. (NECA) submits these comments in response to the Commission's Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding.¹ The NPRM requests comment on proposals to

¹ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan,

streamline and simplify methods used to assess contributions for the federal universal service fund (USF).² Comment is also sought on proposed rules governing ways that carriers recover the costs of contributing to the fund.³

I. Universal Service Contributions Should Continue to Be Based on Interstate Revenues.

The NPRM seeks comment on whether to continue using billed interstate and international end-user revenues as a basis for assessing universal service contributions, or whether to adopt alternative ways to measure carriers' percentages of interstate services provided, such as a flat "per unit" assessment (*e.g.*, a fixed assessment per line or per account).⁴

Universal Service contributions should continue to be based on billed interstate and international end-user revenues. In its *Universal Service Order*,⁵ the Commission rejected proposals for assessing USF contributions on a non-revenue basis because it

Local Number Portability, and Universal Service Support Mechanisms, CC Docket no. 98-171, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, CC Docket No. 92-237, NSD File No. L-00-72, Number Resource Optimization, CC Docket No. 99-200, Telephone Number Portability, CC Docket No. 95-116, *Notice of Proposed Rulemaking*, 66 Fed. Reg. 28718 (2001)(NPRM).

² *Id.* at para. 1.

³ *Id.* at paras. 2 and 3.

⁴ *Id.* at para. 17.

⁵ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997), as corrected by *Federal-State Joint Board on Universal Service*, Erratum, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), (*Universal Service Order*), *aff'd in part, rev'd in part, remanded in part sub nom. Texas Office of*

recognized that such mechanisms would be administratively unworkable.⁶ In adopting the current revenue-based mechanism, the Commission recognized that all carriers track sales for billing purposes and thus would have accurate data on which to base contributions.⁷ Furthermore, the Commission concluded, “calculating assessments based upon end-user telecommunications revenues also will be administratively easy to implement.”⁸

The same considerations remain valid today. Adopting a flat-fee mechanism would shift a disproportionate burden of universal service payments to low-volume users, be administratively unworkable, and threaten the stability of the universal service mechanism, in violation of section 254’s “predictability” requirement.

NECA has considerable experience administering flat-fee systems. Prior to January 1, 1998, payments to the Commission’s high-cost and low-income fund were assessed on the basis of presubscribed lines (PSLs). Under Commission rules that took effect beginning in 1989, universal service fund amounts were recovered from interexchange carriers (IXCs) based on their respective shares of nationwide PSLs.⁹ The rules required all incumbent local exchange carriers to report PSL data to NECA (at the

Public Utility Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999) (“*TOPUC*”), cert. denied, 530 U.S. 1210 (2000).

⁶ See *Universal Service Order* at para. 852 (explaining that such mechanisms would require the Commission to adopt and administer difficult “equivalency ratios” for calculating the contributions of carriers that do not offer services on a per-line or per-minute basis).

⁷ *Id.* at para. 848.

⁸ *Id.* at paras. 848-850.

⁹ 47 C.F.R. § 69.5(d) (1990).

time, the administrator of the program), and NECA would then calculate and file a flat, per-PSL rate for both the high cost fund and low income fund.

In its initial years, the flat-rate system was comparatively simple to administer because few IXC's were required to contribute to the program. In fact, only those IXC's with more than .05% of nationwide PSLs were required to contribute at all. Since the interexchange marketplace was fairly concentrated at first, only about 20 carriers or so typically met the minimum qualification threshold. By the latter part of the decade, as the number of qualified IXC's increased the difficulties of administering a line-based system quickly became apparent.

For example, a number of billing disputes arose over historical PSL counts. IXC's often claimed, for example, that the PSL data provided by LECs were inaccurate. Often, these disputes arose because IXC's employed methodology counting customer accounts that differed from the methods used to count PSLs. As carrier relationships and provisioning methods became more complex, it also became increasingly difficult to determine what PSLs should be assigned to a particular carrier. Many smaller IXC's operate on a resale basis, providing service to customers utilizing the facilities of other carriers. Some IXC's utilize shared carrier identification codes (CICs), which compounds the problem of associating particular lines with particular carriers. In these instances, an exchange carrier might report a PSL as being assigned to the underlying facilities-based carrier, even though that carrier may not have provided service to end users at all.¹⁰

¹⁰ *NPRM* at para. 30. The *NPRM* recognizes that flat fees may be difficult to determine when there is more than one service provider associated with a particular line.. Also customers often change IXC's one or more times within a given billing cycle. These customers will likely receive multiple flat-fee assessments from the different IXC's involved, leading to customer confusion and resentment.

In the current environment, resolving the “whose line is it” problem would be all but impossible. The number of carriers that contribute to the current mechanism is far greater than the old line-based system, making disputes much more likely. Contribution requirements would likely apply to many more types of carriers as well, including large numbers of non-facilities-based carriers such as pre-paid calling card providers and other resellers. Some type of surrogate mechanism would need to be developed for such carriers, further complicating program administration. Furthermore, changes in technology and carrier provisioning methods, including xDSL technologies, line sharing, unbundled network elements, etc., also would make it very difficult for carriers to determine their own numbers of lines, and correspondingly, the administrator would find it all but impossible to verify payments when received.

The administrative burdens associated with flat fee mechanisms will likely be greater for LECs than for other market participants. While LECs are responsible for assuring that switches are programmed to route traffic to a customer’s presubscribed carrier, the associated records are not used for billing purposes. If presubscribed line data is required for billing universal service contributions, LECs could again be responsible for maintaining and reporting these data, except under the current system the data would be used to determine assessments for thousands of carriers, not just the largest twenty or thirty.

A line-based system also would not be as equitable as the current revenue-based mechanism for determining interstate usage. If lines are used as an assessment mechanism, a large portion of the responsibility for interstate universal service funding would shift to local exchange carriers, who typically have the lowest proportions of

interstate revenues. Since carriers would likely pass flat-fee assessments directly to end users, with each customer paying the same charge regardless of the size of their bills, the system would disproportionately shift universal service contributions burdens to low-volume users.¹¹

For customers of rural LECs serving customers in low-density, high-cost areas, these problems would be particularly acute. As discussed below, requiring carriers to recover their universal service contributions from end users via charges that are disproportionate to interstate usage levels would significantly disadvantaged customers, particularly in rural areas. This inequity would not be addressed by the proposed Lifeline exclusion for the rural customers who do not benefit from that program.

The added complexity and uncertainty associated with a flat-fee mechanism would lead to unpredictability and insufficiency in the size of the universal service fund, exactly the opposite of what section 254(b)(5) of the Act requires. For these reasons NECA does not support replacing the current revenue-based mechanism with a flat-fee mechanism.

II. Universal Service Assessments Should Continue to Be Based on Billed Rather than Collected Revenues.

The Commission should not rely on “collected” revenues as a basis for computing universal service assessments.¹² Shifting to a collected revenue base would reward carriers with poor credit and billing practices and disadvantage carriers with good business practices. Carriers that attempt to use uncollectibles as a justification for the

¹¹ *Id.* at paras. 29 and 45. Indeed, it might be possible for end user bills universal service fees to exceed their total bills.

¹² *See NPRM* at para. 23.

exorbitant contribution charges they levy on end users¹³ have only themselves to blame for shortfalls caused by their poor business practices. The Commission should not shift the burden of these uncollectibles on other carriers, but should instead let the marketplace determine whether such end-user charges are reasonable.¹⁴

Using collected revenues might also increase burdens on both carriers and USAC, since uniform standards would need to be established to determine whether and when revenues should be declared uncollectible. By comparison, billed revenues are easy to determine from carrier accounting records, and more amenable to verification by auditors and/or the administrator.¹⁵

III. The Commission Should Re-examine the “Safe Harbor” Revenue Percentage for CMRS Providers.

As the NPRM recognizes, the current “safe harbor” percentage for commercial mobile radio service (CMRS) carriers appears to be out of date. Wireless carriers’ percentage of interstate traffic appears to have increased significantly due to widespread popularity of mobile “one rate” plans. It is not uncommon for consumers to use wireless telephones to place interstate calls instead of their home wireline telephone because

¹³ *See id.* at 23.

¹⁴ Moreover, as the Commission itself notes, basing universal service contributions on estimates of collected revenues raises concerns about the predictability of universal service funding. *See* NPRM at para. 33.

¹⁵ The NPRM seems to suggest that shifting to a reporting mechanism that uses current collected revenues instead of billed revenues would eliminate concerns about the interval between the reporting of revenues and the assessment of universal service contributions. *Id.* at para. 23. But this result would be caused by decreasing the billing interval, not by substituting collected for billed revenues in the contribution base.

interstate call minutes have already been bundled with local minutes for a flat fee.¹⁶ Because the original safe harbor percentage was based on wireline network data,¹⁷ the FCC should now reevaluate the percentage of interstate wireless revenues using wireless data to more accurately reflect the actual percentage of interstate wireless telecommunications revenues.

IV. The *De Minimis* Exemption Should be Retained.

The current exemption for “de minimis” carriers should be retained. Elimination of the exemption would require that hundreds, if not thousands, of additional carriers to contribute to federal universal service mechanisms, significantly increasing administrative burdens on small entities and on the administrator. In crafting this exemption, the Commission recognized that “the public interest would not be served if compliance costs associated with contributing to universal service were to exceed actual contribution amounts.”¹⁸ With the advent of quarterly reporting intervals in the past year, and potential initiation of even more frequent reporting intervals, exempting small

¹⁶ See *Id.* at para. 3.

¹⁷ The Commission agreed not to seek supporting data from cellular and broadband PCS providers regarding their reported percentage of interstate telecommunications revenues if they reported at least 15 percent of their cellular and broadband PCS telecommunications revenues as interstate. This determination was based on the level of interstate traffic experienced by wireline providers. See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 21252, 21258-59, para. 13 (1998) (*Wireless Safe Harbor Order*).

¹⁸ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, *Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72*, 13 FCC Rcd 5318, 5465, para. 295 (1997).

carriers from universal service contribution requirements is a reasonable exercise of the Commission's discretion under section 254(d) of the Act.

V. The Commission Should Permit Rate of Return Carriers to Recover Universal Service Contributions Via An Explicit Interstate Access Charge Element

The NPRM proposes to limit the means by which carriers may recover the costs of contributing to the Commission's universal service programs. Under the Commission's proposal, carriers would still have the flexibility to recover their universal service contributions from end users, should they choose to do so through a line-item or "surcharge" on end user bills. If carriers elect to recover contributions through the line-item charge, however, the Commission proposes to require carriers to apply a uniform charge that corresponds to the prescribed percentage, per-line or per-account assessment established by the Commission. Carriers also would be required to describe the charge as the "Federal Universal Service Charge."¹⁹

The Commission also seeks comment on the impact of its proposed recovery limitation on existing guidelines governing incumbent LEC recovery of universal service contributions.²⁰ Under current Commission rules, price cap carriers may only recover their universal service contributions via end-user charges.²¹ In light of the Fifth Circuit's recent ruling in *Comsat Corp. v. FCC*, 250 F.3d 931 (5th Cir. 2001), the Commission

¹⁹ NPRM at para. 42.

²⁰ *Id.* at para. 46.

²¹ *Id.*

questions whether it should formally amend its rules to apply the same restriction to rate of return carriers as well.²²

The Commission should not limit rate of return carriers' recovery of universal service contributions to end user charges. Although the 5th Circuit court determined that the inclusion of universal service contributions in carrier common line access charges was an "implicit subsidy" prohibited by section 254(e) of the Communications Act, *see Comsat* at 7, *quoting Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*TOPUC*"), that decision conflicts with a prior decision of the 8th Circuit Court of Appeals in *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998), which held that universal service contribution costs are "real costs of doing business" that carriers may pass through to customers that use their services.²³ As explained by the 8th Circuit:

We cannot agree that allowing LECs to recoup from their interstate customers the normal costs of providing telecommunications services to those customers amounts to creating a discriminatory implicit subsidy. . . . Under the [FCC's cost recovery rules], IXCs have the option of recovering their universal service contribution through rates to their long-distance customers. . . . The flow-through of LEC universal service costs to its IXC customers is akin to the flow-through of IXC universal service costs to its long-distance customers – neither can be categorized as an implicit subsidy in violation of § 254(e).²⁴

²² Following issuance of the NPRM, the Commission's Common Carrier Bureau issued an order waiving sections 69.3(a) and 69.4(d)(2) of its rules to permit rate of return carriers to file tariffs recovering universal service contributions "only through the same type of end-user charges" that are assessed by price cap carriers. *See Waiver of Sections 69.3(a) and 69.4(d)(2) of the Commission's Rules, Order*, CCB/CPD 01-15, DA 01-1429 (rel. June 14, 2001).

²³ 153 F.3d at 554.

²⁴ *Southwestern Bell*, 153 F.3d at 553-554 (citations omitted).

In other words, under the 8th Circuit's reading of the Act, inclusion of universal service contribution costs as part of the CCL revenue requirement does not constitute an "implicit subsidy" in violation of section 254(e) – the exact opposite of the conclusion reached by the 5th Circuit.²⁵ The conflict between the 5th and 8th Circuits' decisions leaves the Commission and rate of return exchange carriers in a state of uncertainty.²⁶

NECA pool participants oppose the imposition of additional monthly charges on end users. These companies are primarily rural carriers, who face circumstances that are very different from those of larger carriers serving urban and suburban areas. Rural telephone customers often are able to "reach" only a small population of subscribers within their local calling areas. Urban and suburban customers, by comparison, are often able to call hundreds of thousands, if not millions, of residences and businesses within their local calling areas. Yet, monthly flat rates for local exchange service are roughly comparable between rural and non-rural carriers.

Moreover, all ILECs, including rural carriers, are required to assess the federally-mandated subscriber line charge on customers each month. Rural customers often must pay toll charges on calls that would be local for urban and suburban customers. As a

²⁵ The 5th Circuit's failure to reconcile its decision in TOPUC with the 8th Circuit's reasoning in *Southwestern Bell* is well documented in the concurring opinion in *Comsat* filed by Judge Pogue, sitting by designation, and need not be revisited here. The 5th Circuit's decisions are highly questionable in any event. For example, the 5th Circuit court appears not to have considered the fact that section 254(e) of the Act, by its terms, only applies to universal service *support* amounts, not universal service contributions. Nor did the court consider whether use of the term "should" rather than "shall" in the statute indicated that Congress was merely stating a preference for explicit support recovery methods, not imposing an outright ban on all other methods.

²⁶ Citing the conflict between the circuits and carrier confusion, NECA has urged the Commission's General Counsel to seek review of the 5th Circuit's decision in *Comsat*. Letter of Richard A. Askoff, Esq. NECA Deputy General Counsel, to John E. Ingle, Esq., FCC Deputy Division Chief – Office of General Counsel (June 14, 2001).

result, rates for equivalent levels of local exchange telephone services can be substantially higher for rural than for non-rural subscribers.

Removing universal service contribution amounts from CCL rates and assessing new flat charges on end users would also create an unjustified windfall for interexchange carriers. As demonstrated by comments in the MAG proceeding, IXC's have largely refused to offer various promotional discount plans in areas served by rural carriers, in effect ignoring the Commission's geographic rate averaging rules.²⁷ Since rates for even the largest IXC's are largely unregulated by the Commission, it is highly unlikely that reductions in CCL rates will be passed along to consumers, especially those in rural areas where competition among IXC's is minimal. Thus, the benefits of any additional charges paid by rural end users will either be pocketed by IXC's, or, at best, passed along to customers in urban and suburban areas, where IXC's typically choose to compete.

In the wake of the 5th Circuit's decision in *Comsat*, the Commission appears to have assumed that it must limit both large and small carriers to an end user recovery mechanism.²⁸ Yet, a reasonable middle ground may be found between rules permitting carriers to include universal service contribution amounts in carrier common line access charge revenue requirements and the more restrictive "end-user charge or nothing" approach.

Specifically, the Commission should permit rate of return carriers to recover their universal service revenue requirements via a new, explicit per-minute of use charge

²⁷ See, e.g., Petition for Rulemaking of the LEC Multi-Association Group, CC Docket No. 00-256 (filed Oct. 20, 2000) at 13.

²⁸ See Waiver of Sections 69.3(a) and 69.4(d) of the Commission's Rules, CCB/CPD 01-15, *Order*, DA 01-1429 (rel. June 14, 2001).

levied upon interstate access customers. Permitting rate of return carriers to establish such a new charge would be in full compliance with section 254(e) of the Act, and will assure continued recovery of universal service contributions by rural carriers in an equitable manner, without creating any unjustified windfalls for IXC's.

VI. Conclusion

The Commission should continue to use billed interstate and international end-user revenue data to assess universal service fund contributions, and should not adopt a flat fee mechanism. Flat fee assessments would unfairly burden low volume carriers and their customers. Further, such mechanisms would be unworkable in the current, complex telecommunications marketplace.

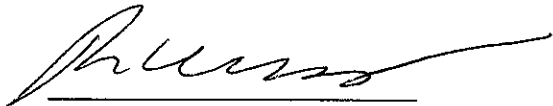
The Commission should review the current CMRS "safe harbor" percentage to assure that it reflects current market conditions. The Commission should not, however, modify or eliminate the current *de minimis* exemption because doing so would greatly increase administrative burdens on small carriers and the administrator.

Finally, the Commission should not require rate-of-return carriers to recover USF contributions from end users but should instead permit these carriers to recover their universal service contributions from interstate access customers via an "explicit" access charge, assessed on a per-minute of use basis.

Respectfully submitted,

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I hereby certify that copy of the Comments was served this 25th day of June 2001, by electronic delivery or first class mail, to the persons listed below.

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